In the Supreme Court of the United States

No. 78-671

CECILIA ESPINOZA and RODOLFO ESPINOZA,
Petitioners,

vs.

FARAH MANUFACTURING COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1) (the "Act"), and of Equal Employment Opportunity Commission Regulation, 29 C.F.R. § 1606.1(d) (1972), appear in Petitioner's Brief at pages 2-3.

QUESTION PRESENTED

Did Farah violate Section 703(a) of the Act by refusing to consider Espinoza for employment because she is not a United States citizen when more than 97% of Farah's employees in the position sought by Espinoza are of her Mexican national origin, as was the person hired in her stead?

STATEMENT

Espinoza, a resident alien whose national origin is Mexico, was denied consideration for employment by Farah pursuant to a long-standing employment policy which requires Farah employees to be United States citizens. Espinoza filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Regional Director of the EEOC issued his Finding of Fact which included determinations that: (1) Espinoza believed that the persons hired in her stead were Spanish surnamed United States citizens; (2) Espinoza's sister-in-law, a Spanish surnamed citizen was employed by Farah; (3) Farah's San Antonio plant employs about 625 persons, 95% of whom are Spanish surnamed Americans; and (4) "The evidence in the record does not establish that . . . [Farah] refused to employ . . . [Espinoza] because she is Spanish surnamed."[1]

Upon issuance by the EEOC of a Notice of Right to Sue, pursuant to 29 C.F.R. § 1601.25b(d) (1972), Espinoza brought suit. The District Court granted her motion for Summary Judgment, holding that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Fifth Circuit reversed,

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1. Jt. App. 131-133. Although not included in the final form of his Finding of Fact, the earlier draft of "Regional Director's Finding of Fact," (Jt. App. 115) correctly sets forth the controlling issue and what Farah believes to be the correct disposition thereof:

> "11. I find that the issue in this case is 'citizenship' and not national origin.
>
> "12. I find no evidence in the record which indicates that [Farah] did not hire [Plaintiff] because of her national origin."

finding that Espinoza was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason." 462 F.2d at 1333; Petition for Writ of Certiorari at 3a. The Court held that "Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress." 462 F.2d at 1333-34; Petition for Writ of Certiorari at 5a.

SUMMARY OF ARGUMENT

Title VII prohibits discrimination on the basis of national origin. "[O]nce the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." *Phillips* v. *Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *rev'd on other grounds*, 400 U.S. 542 (1971). Espinoza's categorization of Farah's employment policy as "arbitrary" or "unjustified" does not render it unlawful nor does it invoke the standards of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In the first place, the legislative history of the Act supports Farah's and the Fifth Circuit's interpretation of the term "national origin," which looks to ancestry or ethnic background. The EEOC and the Office of Federal Contract Compliance apparently understand the term to mean "ethnic origin" or "ancestry," since both agencies use those words in regulations relating to national origin discrimination. Furthermore, the federal government, which has long prohibited national origin discrimination in federal employment, restricts job applications to United States citizens. Finally, a large number of states have fair employment practices legislation prohibiting national

origin discrimination in employment but still allow pre-employment inquiries on citizenship. In short, the Fifth Circuit interpretation is remarkable only for its consistency with the ordinary meaning and prevailing understanding of "national origin."

Second, the case involves a single resident alien of Mexican national origin, not any number of imaginary job applicants of varying national origins. It cannot be said that where over 90% of Farah's employees are of Mexican national origin, that Farah's employment policy discriminated against Espinoza or discriminates against Spanish language groups. Neither *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), nor *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), requires a different result.

Third, the EEOC guideline which prohibits discrimination on the basis of citizenship may be entitled to "great deference,"[2] *Griggs* v. *Duke Power Co.*, 401 U.S. at 434, but it is not entitled to blind adherence. Adherence to the guideline may be appropriate on another set of facts, but it is not appropriate here. Farah's preference for United States citizens did not result in discrimination against Espinoza on the basis of her Mexican national origin, the prohibited statutory ground of discrimination.

Fourth, Espinoza's reliance on 42 U.S.C. § 1981 is misplaced. The legislative history of that measure clearly shows that it prohibits private racial discrimination and racial and alienage discrimination in a state-action context. Legislative history also clearly shows, however, that Section 1981 does not, nor could it constitutionally, prohibit private alienage discrimination. Consequently, Farah's

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2. There is a substantial due process question, which Farah has not pursued, whether the EEOC guideline is entitled to any weight in this case since it was promulgated on January 13, 1970, six months after Espinoza was denied consideration for employment.

preference for United States citizens is not prohibited by 42 U.S.C. § 1981.

Finally, the so-called "contemporary public policy to protect aliens," which Espinoza finds in recent Supreme Court cases involving state action and the Fourteenth Amendment, is merely an affirmation of the long-standing right of aliens to equal protection under the laws and has no relevance to the private sector. To be given effect, public policy must be properly grounded in the law. Since neither Title VII nor 42 U.S.C. § 1981 provides that foundation, it is incumbent upon Congress to express that policy (if it exists) in unequivocal language by an amendment to Title VII which would prohibit private discrimination on the basis of "alienage," "foreign origin," or "citizenship." Until that time, Farah's preference for United States citizens is not unlawful.

INTRODUCTION

The Court must determine whether Espinoza, a resident alien of Mexican national origin, was unlawfully discriminated against when Farah refused to consider her application for employment because she lacked United States citizenship. A decision will be reached *on the facts in this case*, and the facts must be put in a proper perspective.

Espinoza's references to various ethnic groups and their economic status, past and present, are irrelevant. This case involves a single resident alien of Mexican national origin whose one and only job application during three years of United States residence was at Farah. Jt. App. 74, 86.

Second, and simply to set the record straight, it is necessary to dispel the impression left by Petitioner's brief

that Farah's policy affects only aliens actually residing in the United States who intend to become United States citizens. The term "resident alien" simply refers to an alien, admitted to permanent United States residence, who has been issued a Form I-151 Alien Registration Receipt Card—the so-called "green card." The "resident" alien may actually reside in the United States, or he may reside outside the country (in Mexico, for example) and commute daily to work in the United States. But both the "commuter" and "resident" alien have identical immigration status. *Sam Andrews' Sons* v. *Mitchell*, 326 F. Supp. 35, 39 (S.D. Cal. 1971), *rev'd*, 457 F.2d 745, 749 (9th Cir. 1972). Their actual place of residence and citizenship intent, if any, may be quite different, however. Consequently, Farah's policy, which on the surface seems to affect only aliens with citizenship intent residing in the United States, in fact applies with equal force to large numbers of commuter aliens who have no intention of becoming United States citizens (or even of ever residing in the country) but who commute daily to take advantage of economic opportunities in the United States.[3]

Any issue involving aliens, including their employability (as a commuter or otherwise), necessarily cuts across an area of federal legislation and regulation which is constantly being reviewed.[4] The legislative history of Title VII and the federal government's employment policy

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3. The problem of the "commuter" alien displacing United States citizens of Mexican (or any other) national origin from employment is just one of many problems in the complex and inter-related area of immigration and naturalization. Any decision affecting this area, particularly in light of the Act and its legislative history, viewed against the background of the federal government's employment policy, is more properly left to Congress.

4. See H.R. 982, 93d Cong., 1st Sess. (1973), dealing with the employment of illegal aliens. See generally 8 U.S.C. §§ 1101-1503 and 8 C.F.R. Parts 1-4 (1973).

show conclusively that Congress did not intend to prohibit private employment preference for United States citizens. To accept Espinoza's argument that Title VII prohibits alienage discrimination would be to fly in the face of unambiguous statutory language to the contrary and of unmistakable congressional intent in an area peculiarly susceptible to congressional surveillance. It is against this background that the Court must determine whether a single alien of Mexican national origin was unlawfully discriminated against when she was refused employment consideration by Farah.

I. The Fifth Circuit Interpretation of the Term "National Origin" As Used in Title VII Is Consistent with the Act's Legislative History and the Ordinary Meaning and Prevailing Understanding of That Term.

A. Legislative History and Government Agencies.

Proper statutory construction begins with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Richards* v. *United States*, 369 U.S. 1 (1962). The ordinary meaning of the term "national origin" is the country of one's ancestry. The legislative history of the Act, as expressed in the Minority Report on Title VII, reflects exactly that understanding of the term.

> There is no material change in the substantive provisions of this title and its predecessor title defining "unlawful employment practices" hence the general coverage of both provisions is the same. In defining the basis of discrimination, the subcommittee proposal contained the words "to discriminate against any individual because of his race, color, religion, national origin, or *ancestry*." The pending bill omits

> the words "or ancestry." 2 U.S. Code Cong. & Ad. News 2445 (1964).

Congress obviously felt that the terms "national origin" and "ancestry" were synonymous and that the use of both was redundant. Clearly Congress understood that the deletion of the term "ancestry" did not change Title VII's general coverage. This understanding is further buttressed by the remarks of Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill.

> "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. 110 Cong. Rec. 2548-49 (1964)."

Consequently, Espinoza's complaint that the Fifth Circuit interpretation of "national origin" is too narrow is more properly directed to Congress; the Fifth Circuit interpretation is merely an expression of unmistakable legislative intent.

But not only is the Fifth Circuit decision squarely on line with Congressional intent, it is an accurate expression of the prevailing understanding of "national origin." The EEOC, the very agency which is charged with enforcement of Title VII, uses the term "ethnic identity" in its regulations,[5] "ethnic origin" in one of its forms,[6] and explains the term "Spanish Surnamed American" (which must imply United States citizenship) in terms of Mexican, Puerto Rican, Cuban, or Spanish "origin,"[7] *i.e., the country of origin or ancestry.* The Office of Federal Contract Com-

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5. 29 C.F.R. § 1602.13 (1972).

6. Apprenticeship Information Report EEO-2-E, Instruction 7.

7. Employer Information Report EEO-1, App. 5; Apprenticeship Information Report EEO-2, explanatory n. 1.

pliance has issued recent guidelines on national origin discrimination. 41 C.F.R. § 60-50 (1973). The terms "ethnic groups," "ethnic organizations," "ethnic media," and "ancestry" are used throughout.

B. Federal Government Employment Policy.

The Fifth Circuit interpretation is also consistent with the federal government's understanding of the term national origin. In fact, the United States, in its Memorandum as Amicus Curiae on Petition for Writ of Certiorari in this case, expressly stated that "the United States agrees with the interpretation of 'national origin' by the court below."[8]

Since 1914 Civil Service Commission Regulations have limited the right to enter competitive examination for employment by the government to United States citizens. Executive Order No. 1997 (1914); see 5 C.F.R. § 338.101 (1972). Yet, since 1943, six Presidents of the United States have, by Executive Order, prohibited national origin discrimination in federal government employment.[9] A former proviso to Section 701(b)[10] of Title VII of the Act stated:

> . . . That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race,

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8. Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari at 5.

9. Exec. Order No. 9346 (1943) issued by President Roosevelt; Exec. Order No. 10308 (1951) by President Truman; Exec. Order No. 10479 (1953) by President Eisenhower; Exec. Order No. 10925 (1961) by President Kennedy; Exec. Order No. 10246 (1965) by President Johnson; and Exec. Order No. 11478 (1969) by President Nixon.

10. Civil Rights Act of 1964, Title VII, § 701(b), 78 Stat. 253 (1964).

> color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy.

In the course of reorganizing some United States statutes, this proviso was repealed and re-enacted without material change as 5 U.S.C. § 7151. Furthermore, the Treasury, Postal Service, and General Government Appropriation Act, 1973 includes a provision that unless otherwise specified "no part of any appropriation *contained in this or any other Act* shall be used to pay compensation of any officer or employee of Government of the United States . . . unless such person is a citizen of the United States. . . ."[11] Thus, it is readily apparent that the very legislative body which forbade discrimination in employment, both private and public, on the basis of national origin also imposes the citizenship requirement as a condition to employment by the federal government. Farah is doing no more than following the example set by the federal government, that is, interpreting its prohibition against national origin discrimination as being consistent with a citizenship prerequisite for hiring.

Espinoza's categorization of federal government employment policies as an "odd bit of backdoor legislation"[12] has a hollow ring. In order for Espinoza's argument to have any validity at all, it must be assumed that the last six presidents of the United States had no idea that the Civil Service Commission has for the last fifty-nine years restricted federal government employment to the United States citizens. It must also be assumed that Congress, in enacting the 1964 Civil Rights Act and in reorganizing

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11. § 602 P.L. 92-351; 86 Stat. 471 (1972). (Emphasis added.)

12. Petitioner's Brief at 43.

portions of that legislation in 1966, was not cognizant of federal government employment policies. Finally, in order to lend credence to Espinoza's argument, it must be assumed that Congress, in enacting any number of appropriations bills over the years, has not realized that the funds may not be used to pay any government employee who is not a United States citizen. The merits or the reasons for the government's policy are irrelevant. The important point is that for thirty years the government has prohibited national origin discrimination in federal employment but has seen no conflict in simultaneously retaining the United States citizenship requirement. The only plausible conclusion is that Congress did not in 1964, and does not now, consider national origin as synonymous with citizenship.

C. State Fair Employment Practices Legislation.

Finally, state fair employment practices legislation, which originated in New York in 1945, supports the Fifth Circuit's interpretation of the term "national origin." By the time of the passage of the 1964 Civil Rights Act some twenty-eight states had fair employment practices legislation.[13] New York, and virtually all other states, had included "national origin" and/or "national ancestry" among the prohibited grounds of discrimination. Nevertheless, "national origin" is not interpreted to encompass "citizenship." To the contrary, many states had followed New York's lead in holding expressly that an employer's continued imposition of a requirement of United States citizenship as a precondition for employment was not inconsistent with the state's ban on discrimination on the basis of na-

13. EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 5-6.

tional origin.[14] Finally, Minnesota, one of the states following New York's lead, defines "national origin" in its State Act Against Discrimination as "the place of birth of an individual or any of his lineal ancestors."[15]

Against this background of uniform interpretation of the term "national origin," Espinoza suggests that the Court look to her place of birth in order to determine whether there has been discrimination on the basis of national origin. Espinoza was born in Mexico; therefore, her one and only national origin is Mexico. As EEO Form-1 instructs, she is of Mexican "origin." But 92% of Farah's employees are of the same national origin, as was the person hired in her stead. Consequently, under the terms of Title VII, which prohibits discrimination on the basis of national origin (not "foreign origin" or "citizenship"), there has been no unlawful discrimination in this case.

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14. Nineteen states have published pre-employment inquiry guidelines which instruct an employer on lawful inquiries which can be made of a job applicant. All prohibit discrimination on the basis of national origin, but eighteen of the nineteen states allow an employer to ask whether the applicant is a United States citizen. The states are Arizona, California, Delaware, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. Only New Jersey prohibits any inquiry about citizenship. See 2 CCH Employment Prac. Guide ¶20,000ff.

15. 2 CCH Employment Prac. Guide ¶24.401, §363.01 Minn. State Act Against Discrimination, Minn. Stat. (1969).

II. Where 92.5% of Farah's Work Force Is of Mexican National Origin, Farah's Preference for United States Citizens Does Not Discriminate Against Spanish Language Groups in Violation of Title VII, Phillips v. Martin Marietta Corp., or Griggs v. Duke Power Co.

It must be remembered that this case involves a single resident alien of Mexican national origin. Farah has shown that this one individual was not discriminated against on the basis of her Mexican national origin; it need not show that any number of imaginary job applicants have not been unlawfully discriminated against. The uncontroverted affidavit of Farah's corporate secretary, Pedro Villaverde, whose national origin is Mexico, indicates that at the time of the alleged violation in this case:

(1) 92.5% of Farah's employees were of Mexican national origin;

(2) 96.3% of the work force at the San Antonio plant was of Mexican national origin; and

(3) 98.5% of the individuals employed in the position sought by Espinoza were of Mexican national origin. Jt. App. 36-38.

Espinoza does not allege that she was discriminated against on the basis of her national origin. The EEOC Regional Director found that Farah did not refuse to consider Espinoza because she is Spanish surnamed. Even the District Court acknowledged that the evidence negates "discrimination on the basis of ancestry or ethnic background." 343 F. Supp. at 1206; Petition for Writ of Certiorari at 11a. Finally, the Fifth Circuit found that "Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her par-

ents' birthplace . . . [but] because she had not acquired United States citizenship." 462 F.2d at 1333; Petition for Writ of Certiorari at 5a. Farah does not disagree with this overwhelming consensus of opinion.

Second, Farah need not show that if its employment policy were changed, a greater percentage of Mexicans would be employed. Such hypothetical speculation has no place before this Court. The simple fact is that a person of Mexican national origin was rejected, and a person of Mexican national origin was accepted. Thus, application of the employment policy had absolutely no effect on the percentage of Spanish language persons hired.

Third, Farah does not take refuge behind numbers. That 92.5% of its work force is of Mexican national origin does not show conclusively that Farah's treatment of Espinoza was legal. On the other hand, where Farah has already shown that Espinoza was not unlawfully discriminated against, the numbers certainly do not detract from Farah's position and, in fact, strengthen it. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), does not require a different result. In *Phillips* the employer refused to hire women with pre-school age children. When challenged by Mrs. Phillips, the employer argued that it was not guilty of sex discrimination on the theory that 75% to 80% of its employees were women; therefore, there could be no discrimination against women. The Court disagreed. There was sex discrimination because men with pre-school age children were hired, but not women with pre-school age children. At first blush, it might seem that Farah is taking the same position as Martin Marietta: Farah did not discriminate against Espinoza, because more than 90% of Farah's employees share Espinoza's national origin. There is a crucial difference, however. In *Phillips* the job applicant was a woman with pre-school age chil-

dren; no women with young children were employed, but men were. Women were treated differently than men. The result was sex discrimination. In the instant case, Espinoza is of Mexican national origin, but more than 90% of Farah's employees are of Mexican national origin. Espinoza has been discriminated against not because of her Mexican national origin (a prohibited basis of discrimination), but because of her citizenship (a basis of discrimination not prohibited by Congress). Likening Farah's situation to the "sex-plus" discrimination in *Phillips* does not change that. Stated another way, in *Phillips* the employer's discrimination was directed, not at *people* with young children, but at *women* with young children. Farah's policy, on the other hand, affects all alien job applicants equally, regardless of national origin. Consequently, the resulting discrimination is not on the basis of national origin but alienage.[16]

Finally, under Farah's interpretation of "national origin," which is consistent with the legislative history of Title VII, the government's employment policy, and state fair employment practices legislation, there is no violation of Title VII. Simply referring to Farah's policy as "arbitrary and unjustified" will not invoke the standards of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* does not make unlawful the myriad of so-called "arbitrary" hiring policies not prohibited under Title VII. In other words, application of *Griggs* will not produce a national origin violation where none exists; and since there is no national origin discrimination here, *Griggs* is irrelevant.

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16. Contrary to Petitioner's protestations (Petitioner's Brief at 20-21), that over the years Farah has hired a single Mexican alien and literally thousands of citizens is meaningless. If it proves anything, it is that Farah discriminates in favor of Mexican aliens.

III. Because Alienage Discrimination in This Case Did Not Result in Discrimination on the Basis of National Origin, Application of the EEOC Guideline Is Inappropriate.

> The EEOC policy guideline provides:
> Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. § 1606.1(d) (1972).

Admittedly, a preference for United States citizens *could* be used to discriminate on the basis of national origin, but that is not the case here. As applied *to the facts of this case*, the EEOC guideline is inapposite.

Prior to its publication the EEOC agreed with Farah. The Regional Director in an early draft of his Finding of Fact correctly observed that "the issue in this case is 'citizenship' and not national origin."[17] In a 1967 Opinion Letter, released April 28, 1967, and appended to this brief, the Acting General Counsel of the EEOC held that discrimination against nonresident aliens did not constitute discrimination based on national origin. In the course of that opinion, the General Counsel said:

> It is evident that discrimination against nonresident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forbears came . . . not to whether or not he is a United States citizen, nor *a fortiori*, to whether, if an alien, he resides in or without the United States.[18]

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17. Jt. App. 115.

18. Opinion Letter of Acting General Counsel, EEOC, March 21, 1967, Released April 28, 1967, and appended to this brief.

That Farah's preference for United States citizens affects both resident and nonresident aliens does not alter the correctness of the General Counsel's opinion. Neither does the subsequent publication of the EEOC guideline. The uncontradicted facts of *this case* remain unchanged; Farah has not used its longstanding citizenship requirement in any way which has resulted in discrimination against Espinoza because of her Mexican national origin.

This Court recognized in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), that the EEOC interpretation of the Civil Rights Act is "entitled to great deference." But this Court went on to say, *"Since the Act and its legislative history support the Commission's construction*, this affords good reason to treat the Guidelines as expressing the will of Congress." 401 U.S. at 434. (Emphasis added.) In the case at bar, however, neither the facts, the language of the Act, nor its legislative history support the EEOC guideline. *Griggs* does not advocate blind adherence to EEOC guidelines, but favors an analytical approach:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers of employment WHEN [not "because," as used in the EEOC guideline] the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 401 U.S. at 431. (Emphasis added.)

Thus *unless* a citizenship requirement in employment results in national origin discrimination, there is no unlawful act. It has been overwhelmingly shown *in this case* that Farah's preference for United States citizens has not resulted in discrimination against Cecilia Espinoza on the basis of her Mexican national origin.

The EEOC has tacitly agreed. In the Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari filed in this case, it was admitted that:

> . . . in the present case the record does not suggest that the Company was using the citizenship requirement as . . . a subterfuge since more than ninety percent of its employees are of Mexican origin. Therefore, *this is not a case that presents the kind of practices that Title VII of the Act and the EEOC Guideline were intended to prevent.*[19]

Consequently, the Fifth Circuit in the eyes of the United States correctly rejected application of the EEOC guideline in this instance.

IV. Private Discrimination on the Basis of Alienage Is Not Prohibited by 42 U.S.C. § 1981.

Espinoza's delayed[20] reliance on 42 U.S.C. § 1981 is misplaced. That measure prohibits racial discrimination in the private sector and racial and alienage discrimination founded in state action. The statute's legislative history shows conclusively that Section 1981 does not prevent alienage discrimination in private employment.

A. The Thirteenth Amendment and the Civil Rights Act of 1866.

The Thirteenth Amendment to the United States Constitution prohibiting slavery and involuntary servitude was proclaimed effective on December 18, 1865.[21] The en-

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19. Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari at 6. (Emphasis added.)

20. Petitioner's Brief on the Merits raises for the first time in this proceeding the question of the applicability of 42 U.S.C. § 1981 to Farah's actions.

21. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

abling clause of that amendment gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873). Legislation passed pursuant to the enabling clause "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not" and must relate to "slavery and its incidents." *Civil Rights Cases*, 109 U.S. at 21-24, 27 L.Ed. at 843.

The Civil Rights Act of 1866 was passed on April 9, 1866, pursuant to the enabling clause of the Thirteenth Amendment.[22] Section 1 of the 1866 Act provided, in part:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and territory in the United States, to make and enforce contracts . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . . 14 Stat. 27 (1866).

The major purpose of the Act was "to secure to the recently freed Negroes all the civil rights secured to white men. . . . None other than citizens of the United States were within the provisions of the Act." *Hague* v. *CIO*, 307 U.S. 496, 509 (1938). See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 676 (1898); *United States* v. *Cruikshank*, 92 U.S. (2 Otto.) 542, 553-56, 23 L.Ed. 588, 592 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95-98, 21 L.Ed. 394, 415 (1873) (Field, J., dissenting). The 1866 Act

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22. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) for a discussion of the legislative history of the 1866 Act.

declared Negroes to be citizens of the United States and enumerated certain rights, attendant to that status, which could be enjoyed without discrimination because of race, color, or previous condition of servitude. *Elk* v. *Wilkins*, 112 U.S. 94, 112-15, 28 L.Ed. 643, 650 (1884) (Harland & Wood, JJ., dissenting); *United States* v. *Cruikshank*, 92 U.S. (2 Otto.) at 553-56, 23 L.Ed. at 592. That act was clearly not applicable to aliens as such, nor could it constitutionally be, since the measure was passed pursuant to the enabling clause of the Thirteenth Amendment. Such measures must relate to slavery and its incidents; alienage is not slavery.

B. The Fourteenth Amendment and the Civil Rights Act of 1870.

Against a background of concern that the sweeping provisions of the 1866 Act might be repealed or modified by subsequent legislation, the same Congress which passed the 1866 Act proposed the Fourteenth Amendment on June 13, 1866. The main purpose of the Fourteenth Amendment was to establish (or reaffirm) the citizenship of the Negro. See *In re Griffiths*, 41 U.S.L.W. 5143, 5149 (U.S. June 25, 1973) (Rehnquist, J., dissenting); *Elk* v. *Wilkins*, 112 U.S. 94, 101-03, 28 L.Ed. 643, 646 (1884); *United States* v. *Cruikshank*, 92 U.S. (2 Otto.) 542, 23 L.Ed. 588 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-73, 21 L.Ed. 394, 407 (1873). The first clause of the Amendment establishes *citizenship*; the second is concerned with privileges and immunities of *citizens;* but the third and fourth protect "any person," not just citizens. Thus, for the first time, protections were extended to aliens, but only in the state-action context of the Fourteenth Amendment.[23]

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23. See *Moose Lodge No. 197* v. *Irvis*, 407 U.S. 163, 172 (1972) reaffirming the long-standing proposition that the Fourteenth Amendment does not reach private discrimination. See *Civil Rights Cases*, 109 U.S. 3 (1883).

The Civil Rights Act of 1870 was passed on May 31, 1870.[24] "Its purpose was to enforce the provisions of the Fourteenth Amendment, pursuant to the authority granted to Congress by the fifth section of the amendment. By §18 it reenacted the Civil Rights Act of 1866." *Hague* v. *CIO*, 307 U.S. 496, 510, 83 L.Ed. 1423, 1434 (1938). Thus, Section 1 of the 1866 Act, which extended citizenship to Negroes and enumerated certain rights of citizens (among them personal rights, including the right to enforce contracts, and property rights) was reenacted. Broadening the coverage of the 1866 Act was Section 16 of the 1870 Act which extended to "all persons within the jurisdiction of the United States" (aliens) those personal rights, including the right to enforce contracts, originally enumerated and limited to citizens in Section 1 of the 1866 Act. The property rights given to citizens in Section 1 of the 1866 Act, however, were not extended to "all persons within the jurisdiction of the United States" by the 1870 Act. Consequently, after passage of the 1870 Act, the situation was this: Citizens enjoyed certain personal and property rights enumerated in the 1866 Act and were protected from *private racial discrimination* under the provisions of that Act passed pursuant to the Thirteenth Amendment; as a result of the Fourteenth Amendment and the 1870 Act passed pursuant thereto, citizens were also protected from racial discrimination founded on state action. Aliens, however, were protected only by the state action provisions of the Fourteenth Amendment and Section 16 of the Civil Rights Act of 1870 (passed pursuant to that amendment) which extended to them certain personal rights, including the right to enforce contracts.

That the 1866 Act was reenacted in 1870 was of no moment to aliens; they were not covered by the earlier

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24. 16 Stat. 144 (1870).

act, nor could they be since the 1866 Act was passed pursuant to the enabling clause of the Thirteenth Amendment which authorized legislation pertaining to slavery and its incidents. Any protection derived from the 1870 Act was as a result of provisions which were added to the 1866 Act. Thus, the derivation of 42 U.S.C. § 1981, *as pertains to aliens,* is Section 16 of the 1870 Act, founded on the Fourteenth Amendment which reaches state action;[25] aliens had no enumerated rights prior to that. It is equally clear that *as pertains to citizens and racial discrimination,* the derivation of 42 U.S.C. § 1981 is Section 1 of the 1866 Act founded on the Thirteenth Amendment, which reaches private racial discrimination. The inescapable conclusion is that 42 U.S.C. § 1981 protects persons from private racial discrimination but not private alienage discrimination. It is equally clear and undisputed by Farah that Section 1981 is applicable to alienage discrimination, *but only in the state action context* of the Fourteenth Amendment. The result is that Section 1981 applies to private and state-action racial discrimination and state-action alienage discrimination, but not to alienage discrimination in private employment.

Thus, Espinoza's argument that "Section 1981 applies to private employment discrimination," Petitioner's Brief 27-30, is correct—as far as it goes. Every case cited by Espinoza in support of that argument, beginning with *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), involves racial discrimination.[26] Farah's examination of the legislative history of Section 1981 shows conclusively that that measure applies only to *racially motivated* private employment discrimination. In *Jones* v. *Alfred H. Mayer Co., supra* at 413, this Court remarked that Section 1982, which, along

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25. See *Moose Lodge No. 197* v. *Irvis*, 407 U.S. 163, 172 (1972).

26. Petitioner's Brief at 30, n. 30.

with Section 1981, has its origin in Section 1 of the 1866 Act, "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin." In *Georgia* v. *Rachel*, 384 U.S. 780, 791, (1966), this Court also said, "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." To the same effect are *Snowden* v. *Hughes*, 321 U.S. 1, *reh. den.*, 321 U.S. 804 (1944); *United States* v. *Cruikshank*, 92 U.S. (2 Otto.) 542, 23 L. Ed. 588 (1876); *Agnew* v. *Compton*, 239 F.2d 226 (9th Cir.), *cert. denied*, 353 U.S. 959 (1957); *Braden* v. *Univ. of Pittsburgh*, 343 F. Supp. 836 (W.D. Pa. 1972), *vacated and remanded* (on state action), 477 F.2d 1 (3d Cir. 1973); *Abshire* v. *Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Forst* v. *First Nat'l Bank*, 5 FEP Cas. 609 (D.D.C. 1972); *Tramble* v. *Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972). See also *Brady* v. *Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972); *Marshall* v. *Plumbers Local No. 60*, 343 F. Supp. 70, 72 (D.C. La. 1972); *Elkanich* v. *Alexander*, 315 F. Supp. 659 (D.C. Kan.) *aff'd*, 430 F.2d 1178 (1970); *Ambrek* v. *Clark*, 287 F. Supp. 208, 210 (D.C. Pa. 1968); *Swift* v. *Fourth Nat'l Bank*, 205 F. Supp. 563, 566 (D.C.M.D. Ga. 1962).

Espinoza is also partially correct when she argues that "Section 1981 protects against discrimination based on alienage." Petitioner's Brief 31-34. As Farah has shown in its examination of the legislative history of Section 1981, that measure protects against alienage discrimination *only in a state action context*. *Guerra* v. *Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), is apparently the only case which has held that Section 1981 prevents alienage discrimination in private employment. The court pointed to the Thirteenth Amendment which provides the constitutional foundation for prohibit-

ing private discrimination pursuant to Section 1981. The court failed to realize, however, that any legislation passed pursuant to that Amendment must deal with slavery and its incidents. *Civil Rights Cases*, 109 U.S. 3 (1883). Since alienage is not related to slavery and its incidents, private alienage discrimination cannot be prohibited by Section 1981 which is derived from Section 1 of the 1866 Act passed pursuant to the enabling clause of the Thirteenth Amendment. Thus, Espinoza is not entitled to a judgment under the provisions of 42 U.S.C. § 1981.

V. The So-Called "Contemporary Public Policy to Protect Aliens," Which Espinoza Discerns As Prevailing in This Country, Is Merely a Continuing Affirmation of Long-Standing Alien Rights under the Fourteenth Amendment and Does Not Prohibit Private Employment Preference for Citizens.

A so-called public policy which cannot be properly grounded in law remains just that—public policy with absolutely no force or effect. In the first place, it is highly questionable that there is a "contemporary public policy to protect aliens."[27] The numerous recent Supreme Court cases involving aliens have nothing whatever to do with a "contemporary public policy." Those state-action cases merely state the law as it has stood for over one hundred years—that is, "all persons within the jurisdiction of the United States," are entitled to the equal protection of the law.[28] Second, even if there is a contemporary public policy to protect aliens, that policy cannot find a proper foundation in the law. Farah has already shown, and will not repeat the numerous reasons here, that Title VII's

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27. Petitioner's Brief at 38-44.

28. See generally *Sugarman* v. *Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973); *In re Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971).

prohibition of national origin discrimination does not embrace alienage. Farah has also shown that its preference for citizens is not, nor can it constitutionally be, prohibited by 42 U.S.C. § 1981. Finally, Espinoza's categorization of Title VII as the "private employment analog of the Fourteenth Amendment"[29] is grasping at straws. To argue, in effect, that since the Fourteenth Amendment guarantees aliens equal protection of the law, Title VII should prevent alienage discrimination in private employment ignores completely the legal parameters and constitutional origin of those measures.

Espinoza places great reliance on *Graham* v. *Richardson*, 403 U.S. 365 (1971). The "judicial solicitude" of *Graham*, appropriate in state action cases to protect constitutional rights and guarantees, is one thing; but the judicial contortion required to equate "national origin" with "citizenship" in a statutory construction case is quite another. Even the *Graham* Court spoke of separate classifications based on alienage, nationality, and race. To speak of both alienage and nationality (or citizenship and national origin, if you will) would be redundant unless the words have different meanings. Although discrimination on the basis of both classifications could have been proscribed by Congress, Title VII speaks only of national origin, not citizenship. Furthermore, the *Graham* Court indicates an interpretation of "nationality" (or national origin) consistent with Farah's. When speaking of nationality classification, the Court cited cases all of which involve discrimination on the basis of *ancestry*, not citizenship, 403 U.S. at 371 n.5. In short, Espinoza's reliance on *Graham* and a so-called "contemporary public policy" simply misses the mark.

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29. Petitioner's Brief at 39.

Espinoza also sees in federal immigration laws a governmental concern for the employability of aliens. That concern, however, does not even extend far enough to allow aliens employment in the federal civil service.[30] Consequently, the argument that alienage discrimination in private employment interferes with the federal immigration scheme has a hollow and unconvincing ring when the government itself, with narrow exception, bars employment to aliens.[31]

If this "contemporary public policy to protect aliens" has the vitality and validity attributed to it by Espinoza, surely it will be given voice by Congress in clear and unequivocal terms by an amendment to Title VII prohibiting discrimination on the basis of "alienage," "foreign origin," or "citizenship." Until that time, however, Farah is free to prefer citizens so long as implementation of that policy does not discriminate on the basis of national origin.

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30. 5 C.F.R. § 338.101 (1972). See text accompanying notes 9-12, *supra*.

31. Espinoza would have private employers shoulder the the entire burden for insuring the employability of aliens, while imposing no such responsibility on the federal government.

CONCLUSION

Since Farah did not discriminate against Cecilia Espinoza because of any reason prohibited by Congress, the Fifth Circuit decision should be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on August 3, 1973, copies of the foregoing were mailed, postage prepaid, to George Cooper, 435 W. 116th Street, New York, New York 10027 and to Ruben Montemayor, 1414 Tower Life Building, San Antonio, Texas 78205, Attorneys for Petitioner. I further certify that all parties required to be served have been served.

WILLIAM DUNCAN